

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 9, 2007 Session

JAMES EARL THACKER v. REBA FAYE THACKER

Appeal from the Chancery Court for Hickman County
No. 03-239C Russ Heldman, Judge

No. M2005-00930-COA-R3-CV - Filed on April 23, 2007

Trial court awarded Wife divorce based on Husband's admitted adultery and ordered Husband to pay alimony *in futuro* in the amount of \$1,700.00 per month. Husband appeals the type and amount of alimony awarded to Wife as well as the award of Wife's attorney's fees. We affirm the trial court's award of alimony *in futuro* but reduce the amount to \$1,000.00 per month.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Matthew Mayo, Nashville, Tennessee, for the appellant, James Earl Thacker.

Deana C. Hood, Franklin, Tennessee, for the appellee, Reba Faye Thacker.

OPINION

This case concerns the type and amount of alimony awarded to Wife after the dissolution of a twenty-three year marriage. Mr. James Thacker and Mrs. Reba Thacker were married in 1981. The parties had two children, one of which was born to the marriage and the other born from Mrs. Thacker's previous relationship but raised as Mr. Thacker's child. However, neither child was in its minority at the time of divorce.

Prior to the marriage, both Mr. and Mrs. Thacker attained a high school education. Mrs. Thacker maintained employment at various jobs during the marriage including work at a factory, a convenience store, and Hickman County Ambulance Service. In 1991, Mr. Thacker was appointed the Director of the Davidson County Emergency Management team with an average salary of \$82,000.00 per year. At that time, the parties agreed that Mrs. Thacker should limit herself to work on the family farm and caring for the parties' two children.

Mrs. Thacker had back surgery in 1989 due to a ruptured disc. In 1994, Mrs. Thacker experienced further difficulties with her back and her physician again recommended surgery. However, Mrs. Thacker refused the procedure fearing an increase in her medical insurance premiums and further pain.

In 2002, Mr. Thacker began having an extramarital affair with a co-worker. As a result of the relationship, Mr. Thacker lost his position as the Director of the Davidson County Emergency Management team. He thereafter accepted a position with the Emergency Management Division where he netted \$2,838.11 per month.

On September 29, 2003, Mr. Thacker filed a complaint for divorce alleging irreconcilable differences. On August 31, 2004, the trial court awarded Mrs. Thacker a divorce based upon Mr. Thacker's admitted adultery and ordered Mr. Thacker to pay \$1,700.00 a month in alimony *in futuro*. At that time, Mrs. Thacker was forty-nine years old and Mr. Thacker was fifty-four years old. Mr. Thacker now appeals the type and amount of alimony awarded to Mrs. Thacker as well as the award of attorney's fees.

The trial court has broad discretion in determining whether spousal support is required and if so, the nature, amount, and duration. *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn.2004). As such, we are disinclined to alter the trial court's spousal support decision unless an incorrect legal standard was applied or the decision reached was clearly unreasonable. *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn.2001). We review the trial court's findings of fact *de novo* upon the record with a presumption of correctness below. *Robertson v. Robertson*, 76 S.W.3d 337, 342 (Tenn.2002).

There are four types of support recognized in Tennessee: alimony *in futuro*, alimony *in solido*, rehabilitative alimony, and transitional alimony. Tenn.Code Ann. § 36-5-121(d)(1). The legislature has stated a clear preference for the award of rehabilitative or transitional alimony as opposed to alimony *in futuro*. Tenn.Code Ann. § 36-5-121(d)(2). Alimony *in futuro* was created to provide long-term support to an economically disadvantaged spouse who is unable to be rehabilitated. *Burlew v. Burlew*, 40 S.W.3d 465, 471 (Tenn.2001). Conversely, rehabilitative alimony enables an economically disadvantaged spouse to acquire additional education or training so as "to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonable comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse." Tenn.Code Ann. § 36-5-121(d)(2).

Since the determination of the type, amount and duration of spousal support is a fact-intensive inquiry, the court is required to consider the various factors listed in Tenn. Code Ann. § 36-5-121(I), which provides:

(I) In determining whether the granting of an order for payment of support and maintenance to a party is appropriate, and in determining the nature, amount, length of term, and manner of payment, the court shall consider all relevant factors,

including:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Based on consideration of the factors provided in Tenn. Code Ann. § 36-5-121(I), we agree with the trial court's award of alimony *in futuro*. Mrs. Thacker is clearly economically disadvantaged to Mr. Thacker due to her lack of marketable skills. She spent the majority of her working life tending to the parties' farm and caring for the parties' two children. Conversely, Mr. Thacker has been successful in the field of emergency response, receiving promotions and at one time earning \$82,000.00 per year. Mr. Thacker was also awarded the entirety of his retirement account while Mrs. Thacker is without any retirement savings. In addition, the parties were married for twenty-three years and Mr. Thacker's infidelity largely contributed to the demise of the marriage. Mrs. Thacker's continuing back ailments and advanced age will also prohibit any significant rehabilitation. Because we find that Mrs. Thacker will be unable to reach a standard of living comparable to the standard of living enjoyed during the marriage or the post-divorce standard of living expected to be available to Mr. Thacker, we affirm the trial court's award of alimony *in futuro*.

However in determining an alimony award, the two factors considered most relevant among the list are the economically disadvantaged spouse's need and the obligor spouse's ability to pay. *Robertson*, 76 S.W.3d at 342. Mr. Thacker argues that the amount of alimony awarded to Mrs. Thacker exceeds his ability to pay since the trial court based the award on a determination that he

had an earning capacity equal to his income as Director of Emergency Management for Davidson County. The record reflects that Mr. Thacker lost the Director position in 2002 and that he currently earns \$2,838.11 per month, which is in keeping with his historic income prior to his appointive position as Director of Emergency Management. Mr. Thacker testified that he anticipates receiving promotions and corresponding pay increases in his new position, which may or may not turn out to be true. Since there is no evidence in the record indicating willful underemployment, we reduce the amount of Mrs. Thacker's monthly alimony award to \$1,000.00 which is more reflective of Mr. Thacker's ability to pay. However, we would note that Tenn. Code Ann. § 36-5-121(f)(2)(A) provides that an *in futuro* alimony award remains in the control of the trial court for the duration of the award and may be modified upon a showing of substantial and material change in circumstances. Thus, if Mr. Thacker does enjoy a substantial increase in income, Mrs. Thacker has the right to petition the court for an increase in periodic alimony.

Mr. Thacker finally argues that the trial court erred in awarding Mrs. Thacker her attorney's fees. An award of attorney's fees in a divorce case is generally characterized as alimony *in solido*. *Yount v. Yount*, 91 S.W.3d 777, 783 (Tenn.Ct.App.2002). Because attorney's fees are considered alimony, the award of such fees are subject to consideration of the factors provided in Tenn. Code Ann. § 36-5-121(I), including the ability to pay and the relative fault of the parties. *Yount*, 91 S.W.3d at 783. The Tennessee Supreme Court has stated that "[t]he allowance of attorney's fees is largely in the discretion of the trial court, and the appellate court will not interfere except upon a clear showing of abuse of that discretion." *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn.1995). Although the court awarded Mrs. Thacker the bulk of the marital estate, she was not awarded any income producing assets nor any liquid assets; therefore, she has no means by which to pay her attorney's fees without depleting the assets awarded to her in the division of the marital assets. Conversely, the court awarded Mr. Thacker the entirety of his pension; the record shows that he is gainfully employed; and Mr. Thacker's infidelity largely contributed to the demise of the marriage. We therefore find that the trial court was well within its discretion in awarding Mrs. Thacker her attorney's fees.

The decision of the trial court is affirmed and modified as herein provided. The costs of appeals are assessed against the Appellant, Mr. Thacker.

WILLIAM B. CAIN, JUDGE